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No. 98-1041

In The

Supreme Court of the United States

THE SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, ET AL.,

Petitioners,

v.

PATRICK ADDIS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

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By order dated March 1, 1999, this Court invited the Solicitor General to file a brief in this case expressing the views of the United States. On May 27, 1999, the Solicitor General filed a Brief for the United States as Amicus Curiae. This brief responds to the Solicitor General's filing.

I. THE SOLICITOR GENERAL'S DETERMINATION THAT WISCONSIN'S POSITION REPRESENTS A REASONABLE INTERPRETATION OF THE UNDERLYING FEDERAL STATUTE UNDERSCORES THE IMPORTANCE OF THE QUESTION PRESENTED.

The Solicitor General phrased the question presented as "[w]hether Wisconsin's method of determining benefit eligibility and need levels for a class of Medicaid applicants is consistent with the requirement of 42 U.S.C. 1396a(a)(17)(D) that such methods not 'take into account the financial responsibility' for the applicant of any other person except a parent or spouse" (Solicitor General Br. at I). To the extent that the Solicitor General has attempted to answer that question, his position appears to be that Wisconsin's method is consistent with the statutory requirement. The Solicitor General writes: "[t]hat the decision below rests on a permissible interpretation of Section 1396a(a)(17)(D) does not require the contrary conclusion concerning the different interpretation of that provision advanced by petitioner" (*id.* at 16).[1]

Neither respondents nor the Solicitor General disputes that this case presents an important question. Respondents merely state that they would prefer the case be remanded to the district court to work out implementation of the Seventh

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[1] *See also id.* at 8 ("The court of appeals in this case adopted one plausible interpretation of the relevant provisions of the Medicaid Act. While the alternative construction advanced by petitioner is not unreasonable . . . ."); *id.* at 16 (noting "existence of reasonable textual and policy arguments on both sides of the issue") and; *id.* at 14 ("The court of appeals adopted one permissible answer to that question, holding that the use of such a standard does violate Section 1396a(a)(17)(D)").

Circuit's decision before any review by this Court.[2] The Solicitor General notes that the Medicaid provision at issue in this case is an "important exception" to former AFDC standards (Solicitor General Br. at 9), discusses at some length how the Secretary of Health and Human Services (hereafter "Secretary") has struggled with the very issue presented in this case (*see id.* at 10-14, 16-18), and concludes with the point that "[t]he existence of reasonable textual and policy arguments on both sides of the issue has consistently led the Secretary to acknowledge that the question presented in this case is a difficult one, to which there may be a number of plausible answers" (*id.* at 16-17).

The Solicitor General's position against the granting of a writ of certiorari is based on the fact that there is no conflict with this Court's precedent, there is no split in the circuits and that the Secretary withdrew the proposed regulations that would have been in conflict with the Seventh Circuit's decision (*id.* at 9, 18-19). Petitioners never made any claim to the contrary, and in their Petition for a Writ of Certiorari argued only that this case raises an important federal question.

The Solicitor General provides a rather detailed discussion of the Secretary's proposed regulations on this issue which would have required all States to use a methodology like Wisconsin's, the subsequent comments on the proposed regulations, and the withdrawal of the proposed regulations to "allow States participating in the Medicaid program the greatest possible flexibility to apply those provisions in light of their own state plans, administrative structures, resource constraints, and policy priorities" (Solicitor General Br. at 18, citing 59 Fed. Reg. at 43,052). The Solicitor General specifically notes that the "method for determining eligibility proposed by the Secretary in *Sneede*

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[2] *See* Respondents' Br. in Opposition, No. 98-1041, at 5 (filed Jan. 1999) ("at its current stage of development – this case does not present an important issue of federal law"); *see also id.* at 4, 7.

[v. Kizer, No. C89-1932, 1990 WL 155532 (N.D. Cal. June 8, 1990), *aff'd mem.*, 951 F.2d 360 (9th Cir. 1991), *cert. denied*, 506 U.S. 939 (1992)], was thus essentially the same as the Wisconsin method at issue in this case" (Solicitor General Br. at 12). (The Seventh Circuit relied heavily upon the decision in *Sneede* in deciding the case now before this Court (*see* Pet.-Ap. A-12 to A-13).) The Solicitor General states that if the Secretary had issued the regulations she had proposed which used the statutory construction as Wisconsin uses it, that construction "would have been not only permissible, but authoritative" (Solicitor General Br. at 17), and adds a footnote that the Ninth Circuit in *Sneede* was wrong to suggest "that the terms of the Medicaid Act compelled the result it reached, regardless of the Secretary's construction of the Act" (Solicitor General Br. at 17 n.7).

The Solicitor General agrees with Wisconsin that the Seventh Circuit's decision creates an inconsistency between the determinations of income and need since in calculating the income of a given child part of the mother's income is attributed to that child, and to her spouse and other children, yet the consideration of other children is excluded from the determination of the number of people to include when determining the appropriate level of need of that child (*see* Solicitor General Br. at 16).[3]

The Solicitor General also agrees with Wisconsin that "[i]t is realistic to assume that a parent's resources will be stretched evenly over herself, her spouse, and all of her dependents," but the Solicitor General errs when he states that "'economies of scale'" may not make sense in a program concerning medical assistance, because unlike other costs, a mother does not have to buy less medical care for a second child because she has already bought it for a first child

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[3] The practical effect of the Seventh Circuit's decision is to raise the income eligibility level for Medicaid in Wisconsin for any family with more than one child.

(Solicitor General Br. at 15 n.5). This statement shows a basic misunderstanding of the Medicaid program—assuming there are economies of scale in determining the income eligibility threshold of an applicant, means only that Wisconsin is assuming a family of six has a lower need level per person than a family of two. Under Medicaid if an individual is eligible he is entitled to free medical care (with exceptions not relevant here).

The answer to the question presented will have an enormous impact on the entire system of Medicaid eligibility calculation, not only in Wisconsin, but in all states. While respondents and the Solicitor General limit their discussion to Medicaid applicants who have their own income and who have failed to be covered under both Wisconsin's determination as to eligibility as a group and eligibility as an individual (the proposed class), the rationale underlying the Seventh Circuit's decision, that considering non-financially responsible family members (*i.e.*, a child applicant's siblings or an adult applicant's children) as part of a household when determining the appropriate level of need violates the "anti-deeming" provisions, underlies all of Wisconsin's determinations of Medicaid eligibility, because each determination includes an income threshold assessment for a family.[4]

In sum, Wisconsin's interpretation of 42 U.S.C. § 1396a(a)(17) is reasonable. The Secretary proposed rules

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[4] The court of appeals' opinion is also internally inconsistent on this point. It would permit the parent or parents of a child applicant to be considered as part of that child's household in determining the child's level of need (*i.e.*, the need level would be one-half of the need level for a family of two if one parent, and one-third the need level of a family of three if two parents). However, under the court of appeals' definition, this would be considering the income and resources of non-financially responsible people since the child is not responsible for his parent(s). This means the court of appeals' logic would require each child applicant's need to be that of a family of one.

which would have made Wisconsin's method of calculating Medicaid eligibility mandatory for all States. The Secretary's current position is to give the States flexibility to comply with 42 U.S.C. § 1396a(a)(17). The Solicitor General expressly stated that Wisconsin's legal position is a reasonable interpretation of the relevant statutory provisions. Yet, because of the decision of the court of appeals in this case, the State of Wisconsin and the other two states in the Seventh Circuit (as well as the States in the Ninth Circuit under *Sneede*) will be prevented from using a reasonable, sensible, and, in petitioners' view, lawful, method of calculating Medicaid eligibility.

II. THIS CASE IS RIPE FOR REVIEW BY THIS COURT.

Both respondents and the Solicitor General agree with the State of Wisconsin that this case presents a pure question of law and there is no dispute of fact. While respondents argue that further district court proceedings should be had to force Wisconsin to develop a new methodology for determining Medicaid eligibility to comply with the Seventh Circuit's decision, there is no need to have such proceedings take place prior to a decision by this Court on the underlying question of law.

The Solicitor General includes a footnote in his brief which states, without citation, that the impact of the Seventh Circuit's decision is "obscured by Wisconsin's impending implementation (in July 1999) of a 'child health plan' approved under the State Children's Health Insurance Program, 42 U.S.C. 1397aa *et seq.*" (Solicitor General Br. at 18 n.8). This footnote is a reference to Wisconsin's receiving federal approval to implement "BadgerCare" which expands Wisconsin's Medicaid coverage to a higher income eligibility threshold. BadgerCare is a Title 19 (Medicaid) expansion using Title 21 (Children's Health Insurance Program or CHIP) funds. This means that the same Medicaid income eligibility

rules at issue in this case must be applied to BadgerCare. Accordingly, contrary to the Solicitor General's implication, the impact of the Seventh Circuit's decision is only more important following the implementation of BadgerCare. All BadgerCare does is shift the eligibility determination to a different income level and therefore add more people for whom Wisconsin must make that income threshold eligibility determination.

CONCLUSION

The petition for writ of certiorari should be granted.

JAMES E. DOYLE
Attorney General

SUSAN K. ULLMAN*
Assistant Attorney General

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2775

**Counsel of Record*

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